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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF OREGON

11 PEGGY J. HALLAS, )  
12 )  
13 Plaintiff, )  
14 )  
15 v. )  
16 )  
17 AMERIQUEST MORTGAGE COMPANY, )  
18 a Delaware corporation, )  
19 FIDELITY NATIONAL TITLE IN- )  
20 SURANCE COMPANY, a California )  
corporation, and DEUTSCHE BANK )  
NATIONAL TRUST COMPANY, a )  
NATIONAL ASSOCIATION, TOWN & )  
COUNTRY TITLE SERVICES, a )  
California corporation, )  
Defendants. )

No. CV-04-433-HU

OPINION & ORDER

21 Terrance J. Slominski  
22 7100 S.W. Hampton, Suite 129  
Tigard, Oregon 97223

23 Attorney for Plaintiff

24 David M. Jacobson  
25 DORSEY & WHITNEY LLP  
26 US Bank Centre  
1420 Fifth Avenue, Suite 3400  
Seattle, Washington 98101

27 Attorney for Defendants Ameriquest Mortgage Company,  
28 Deutsche Bank National Trust Company, and Town & Country  
Title Services

1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Peggy Hallas brings this action regarding a  
3 nonjudicial foreclosure and subsequent sale of her real property.  
4 She brings the following claims against the following defendants:  
5 (1) claims under the Truth in Lending Act against defendants  
6 Ameriquest Mortgage Company and Deutsche Bank National Association;  
7 (2) a claim under the Fair Debt Collection Practices Act against  
8 Fidelity National Title Insurance Company and Town & Country Title  
9 Services; (3) a claim under Oregon's Unfair Debt Collection  
10 Practices Act against Ameriquest; (4) a claim of slander of title  
11 against Fidelity and Deutsche Bank; (5) a claim to remove cloud on  
12 title against Deutsche Bank; (6) a claim for breach of contract  
13 against Ameriquest and Fidelity; and (7) a claim for declaratory  
14 relief against Ameriquest, Fidelity, and Deutsche Bank seeking a  
15 declaration that Ameriquest did not have a valid Deed of Trust or  
16 that the foreclosure and deed to Deutsche Bank was not done in  
17 accordance with applicable law.

18 Plaintiff moves for partial summary judgment on her claim for  
19 declaratory relief, seeking a declaration that the trustee's deed  
20 to Deutsche Bank was wrongful and void and that plaintiff is still  
21 the lawful owner of her property. Defendants Ameriquest, Deutsche  
22 Bank, and Fidelity National Title cross-move for summary judgment  
23 on the same issue. All parties have consented to entry of final  
24 judgment by a Magistrate Judge in accordance with Federal Rule of  
25 Civil Procedure 73 and 28 U.S.C. § 636(c). I deny plaintiff's  
26 motion and grant defendants' motion.

27 BACKGROUND

28 Most of the facts are undisputed. In 2002, plaintiff and

1 Ameriquest entered into discussions regarding the refinance of her  
2 home located at 1018 NW 92nd Street in Vancouver, Washington. On  
3 November 22, 2002, plaintiff signed mortgage refinance documents in  
4 Portland, Oregon.

5 The Ameriquest loan allowed plaintiff to pay off her existing  
6 home loan of \$151,032.65 to Novastar Mortgage, and to receive an  
7 additional \$4,182.57 in cash. The settlement statement correctly  
8 stated the street address of the property at 1018 NW 92nd Street in  
9 Vancouver, Washington.

10 Plaintiff's property has the legal description of "Lot 8, Jay  
11 Lee Terrace, according to the plat thereof, recorded in Volume G of  
12 plats page 223, records of Clark County, Washington." However, the  
13 property description attached as Exhibit A to the Deed of Trust  
14 executed by plaintiff and Ameriquest erroneously listed the legal  
15 description as "Lot 9, Jay Lee Terrace, according to the plat  
16 thereof, recorded in Volume G of plats page 223, records of Clark  
17 County, Washington."

18 The copy of this Deed of Trust attached to the Affidavit of  
19 Claire Cotter, Litigation Analyst for Ameriquest, has on the first  
20 page an "abbreviated legal description" as follows: "Lot 9 Jay Lee  
21 Terrace G/223." Exh. 1 to Cotter Affid. at p. 4. Exhibit A to the  
22 Deed of Trust contains the full legal description as noted in the  
23 preceding paragraph. Id. at p 7.

24 Plaintiff states that when she signed the Deed of Trust, it  
25 did not have an "abbreviated legal description" written on the  
26 first page and did not have an Exhibit A attached containing the  
27 full legal description. Attached to her declaration is a copy of  
28 the Deed of Trust which plaintiff initialed and which bears the

1 signature of someone at Ameriquest certifying that it is a true and  
2 correct copy of the original document. On this copy, the space for  
3 the abbreviated legal description is blank. Defendants dispute  
4 that the document lacked the abbreviated legal description or the  
5 Exhibit A with the full legal description.

6 On January 23, 2003, Ameriquest sent plaintiff a notice  
7 regarding its intent to foreclose on her home due to her failure to  
8 make her January 1, 2003 payment. The notice identified the  
9 property only by street address, at 1018 NW 92nd Street in  
10 Vancouver. Plaintiff paid the January 1, 2003 payment after  
11 receiving the foreclosure notice.

12 Due to a complaint lodged by plaintiff with the State of  
13 Washington and the State of Oregon regarding the refinance  
14 transaction, the State of Oregon subpoenaed documents from  
15 Ameriquest. Plaintiff contends when she received the complete  
16 copies of all the loan documents from the State of Oregon, and then  
17 checked with the county recorder's office, she learned that the  
18 Deed of Trust was not on her property (Lot 8) but was on her  
19 neighbor's home (Lot 9).

20 On April 15, 2003, Ameriquest sent plaintiff a notice of  
21 default regarding her failure to make payments due February 1,  
22 2003, March 1, 2003, and April 1, 2003. It contained the correct  
23 street address of the property.

24 On June 30, 2003, Fidelity, on behalf of Ameriquest, sent  
25 plaintiff a notice of default for failing to make payments due  
26 February 1, 2003, March 1, 2003, April 1, 2003, May 1, 2003, and  
27 June 1, 2003. The notice of default identified the property with  
28 the erroneous Lot 9 legal description, but it did correctly recite

1 the street address of 1018 NW 92nd Street, Vancouver.

2 On August 12, 2003, trustee Ticor Title Insurance recorded a  
3 Notice of Trustee's Sale for plaintiff's property. It gave the  
4 correct Lot 8 legal description as well as the correct street  
5 address. It also included the required notice that anyone having  
6 objections to the sale on any grounds would be given an opportunity  
7 to be heard as to those objections if they brought a lawsuit to  
8 restrain the sale pursuant to RCW 61.24.130, and that failure to  
9 bring such a lawsuit could result in a waiver of any proper grounds  
10 for invalidating the trustee's sale.

11 In November 2003, plaintiff filed for bankruptcy and the  
12 trustee's sale was postponed. Plaintiff's bankruptcy petition was  
13 dismissed on December 15, 2003.

14 On January 9, 2004, plaintiff's property was sold at the  
15 trustee's sale. On January 14, 2004, a trustee's deed was recorded  
16 in Clark County, conveying the property to Deutsche Bank, as  
17 trustee of Ameriquest. That trustee's deed accurately identified  
18 the property with the Lot 8 legal description.

19 Despite the foreclosure sale, plaintiff still lives in the  
20 house and eviction proceedings have been abated pending the outcome  
21 of this litigation.

## 22 STANDARDS

23 Summary judgment is appropriate if there is no genuine issue  
24 of material fact and the moving party is entitled to judgment as a  
25 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
26 initial responsibility of informing the court of the basis of its  
27 motion, and identifying those portions of "'pleadings, depositions,  
28 answers to interrogatories, and admissions on file, together with

1 the affidavits, if any,' which it believes demonstrate the absence  
2 of a genuine issue of material fact." Celotex Corp. v. Catrett,  
3 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

4 "If the moving party meets its initial burden of showing 'the  
5 absence of a material and triable issue of fact,' 'the burden then  
6 moves to the opposing party, who must present significant probative  
7 evidence tending to support its claim or defense.'" Intel Corp. v.  
8 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
9 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
10 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
11 designate facts showing an issue for trial. Celotex, 477 U.S. at  
12 322-23.

13 The substantive law governing a claim determines whether a  
14 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
15 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
16 to the existence of a genuine issue of fact must be resolved  
17 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
18 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
19 drawn from the facts in the light most favorable to the nonmoving  
20 party. T.W. Elec. Serv., 809 F.2d at 630-31.

21 If the factual context makes the nonmoving party's claim as to  
22 the existence of a material issue of fact implausible, that party  
23 must come forward with more persuasive evidence to support his  
24 claim than would otherwise be necessary. Id.; In re Agricultural  
25 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
26 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
27 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

28 / / /

1 DISCUSSION

2 Plaintiff contends that because of the erroneous Lot 9  
3 description in the original Deed of Trust recorded at the time of  
4 the refinance, and because the notice of default also contained the  
5 erroneous legal description, the sale of the property at the  
6 trustee's sale is void. Defendants argue that the original Deed of  
7 Trust can be reformed and as reformed, is valid. For the reasons  
8 explained below, I agree with plaintiff that the original Deed of  
9 Trust was invalid as to Lot 8, but I further agree with defendant  
10 that the original deed is subject to reformation.

11 I. Controlling Law

12 The issue of which state's law controls arose at oral  
13 argument. After reviewing the parties' supplemental post-hearing  
14 memoranda, I agree with both parties that Washington law applies  
15 here.

16 Except for the actual signing of the refinance transaction  
17 documents which occurred in Oregon, all other discussions took  
18 place in Washington and the property is located in Washington. As  
19 defendants note, the Deed of Trust contains a provision stating  
20 that it shall be governed by federal law and the law of the  
21 jurisdiction in which the property is located. Exh. 1 to Cotter  
22 Sec. Supp'l Affid. at p. 13.

23 Oregon's choice of law rules recognize that contractual choice  
24 of law provisions should be enforced. See Young v. Mobil Oil  
25 Corp., 85 Or. App. 64, 68-69, 735 P.2d 656-67 (1985) (recognizing  
26 that resolution of dispute required application of law of state  
27 chosen by parties in their contract, unless application of law of  
28 chosen state would be contrary to fundamental policy of state which

1 had materially greater interest than chosen state). Here, the  
2 contractual choice of law provision requires application of  
3 Washington law because that is the state in which the property is  
4 located.

5 Even if there were no contractual choice of law provision,  
6 Washington law would apply. As plaintiff notes, Oregon looks to  
7 the Restatement (Second) of Conflict of Laws § 188 as a guide in  
8 resolving conflict of law questions. Manz v. Continental Am. Life  
9 Ins. Co., 117 Or. App. 78, 82, 843 P.2d 480, 482 (1992), modified  
10 on other grounds, 119 Or. App. 31, 849 P.2d 549 (1993). Pursuant  
11 to Section 188, Oregon relies on the "most significant  
12 relationship" test for choice of law questions involving  
13 contractual disputes. Bush v. Paragon Prop., Inc., 165 Or. App.  
14 700, 712, 997 P.2d 882, 889 (2000) (Wollheim, J., concurring) ("In  
15 contract actions, Oregon generally applies the law of the state  
16 that has the most significant relationship to the parties and to  
17 the transaction."); Young, 85 Or. App. at 68, 735 P.2d at 656  
18 (noting Oregon cases which cite § 188 as authority for reliance on  
19 most significant relationship test).

20 Plaintiff concedes that although it could be argued that  
21 Oregon has an interest in the reformation of documents that were  
22 executed here, under the most significant relationship test,  
23 Washington has the greater interest in the reformation of a deed  
24 purporting to secure property within that state. As defendants  
25 note, Washington's interests are paramount in this case given that  
26 most of the contacts and communications during the loan application  
27 process were conducted while plaintiff was in Washington, the  
28 property is located in Washington, the Deed of Trust was recorded



1 in Washington, the alleged injury occurred in Washington, and the  
2 foreclosure occurred in Washington under Washington law.  
3 Washington has a greater interest than Oregon in recording and  
4 regulating property in Washington. Accordingly, whether the issue  
5 is resolved by reference to the parties' contractual choice of law  
6 provision or by the most significant relationship analysis, the  
7 result is the same - Washington law applies to the resolution of  
8 this dispute.

## 9 II. Validity of Original Deed of Trust

10 Defendants do not contest that absent reformation, the initial  
11 Deed of Trust is invalid. Washington law requires that sales of  
12 real property must describe the property by the correct lot  
13 number(s), block number, addition, city, county, and state. The  
14 Washington Supreme Court explained in a 1949 case that

15 every contract or agreement involving a sale or  
16 conveyance of platted real property must contain, in  
17 addition to the other requirements of the statute of  
18 frauds, the description of such property by the correct  
19 lot number(s), block number, addition, city, county and  
20 state.

21 Martin v. Seigel, 35 Wn. 2d 223, 229, 212 P.2d 107, 110 (1949).

22 In a 1999 case, the Washington Supreme Court declined to  
23 overrule Martin and replace its strict requirement of a legal  
24 description with a rule that would permit the use of a street  
25 address to describe the property. Key Design, Inc. v. Moser, 138  
26 Wn. 2d 875, 883-84, 983 P.2d 653, 659, amended, 993 P.2d 90  
27 (1999).

28 Based on Washington's requirement of an accurate legal  
description, I agree with plaintiff that the original Deed of Trust  
is invalid as to Lot 8 and thus, Ameriquest did not have a valid

1 interest in plaintiff's property to sell at the trustee's sale in  
2 January 2004.

3 III. Reformation

4 Defendants argue that the original Deed of Trust should be  
5 reformed and as reformed, it is valid, defeating plaintiff's  
6 declaratory judgment claim. Defendants acknowledge that the  
7 general rule in Washington is that land transaction contracts or  
8 deeds must meet the requirements of the statute of frauds, which,  
9 under Martin, means a full legal description of real property.  
10 However, defendants contend that exceptions for scrivener's error  
11 or mutual mistake apply here, rendering the Deed of Trust valid.

12 Under Washington law, an agreement containing an inadequate  
13 legal description is void and is not subject to reformation. Berg  
14 v. Ting, 125 Wash. 2d 544, 554, 886 P.2d 564, 570 (1995). However,  
15 where a scrivener's error or mutual mistake leads to the deficient  
16 legal description, the contract may be reformed before assessing  
17 its validity under the statute of frauds. Id.

18 As to a scrivener's error, the court in Snyder v. Peterson, 62  
19 Wash. App. 522, 814 P.2d 1204 (1991) reformed a deficient deed  
20 description based on scrivener's error when the attorney who  
21 drafted the deed inadvertently left the section, township, range,  
22 and meridian off the deed. Id. at 526, 814 P.2d at 1206. The  
23 court noted that all of the parties involved in the case admittedly  
24 intended that the specific parcel of land in question pass to four  
25 siblings equally, there was no evidence of fraud or overreaching,  
26 and the circumstances clearly showed the grantor's intent. Id.  
27 The court stated that it was "apparent from the instrument itself  
28 that the mistake is one of the scrivener, adopted by both parties

1 when they signed the real-estate contract." Id. (internal  
2 quotation omitted).

3 As for mutual mistake, "[r]eformation is also appropriate when  
4 a deficient description in a deed is caused by a mutual mistake."  
5 Snyder, 62 Wash. App. at 527, 814 P.2d at 1207. "Conveyances of  
6 real property may be reformed on the ground of mutual mistake where  
7 such mistake is indicated by clear and convincing evidence." Key  
8 Design, 138 Wash. 2d at 888, 983 P.2d at 661. "The evidence must  
9 show that the intention of the parties was identical at the time of  
10 the transaction and that the written agreement did not express that  
11 intention." Id. "If the intention of the parties is identical at  
12 the time of the transaction, and the written agreement does not  
13 express that intention, then a mutual mistake has occurred."  
14 Tenco, Inc. v. Manning, 59 Wash. 2d 479, 483, 368 P.2d 372, 374  
15 (1962).

16 In Tenco, the court noted that it was obvious from the record  
17 that the wrong property description appeared in the earnest money  
18 agreement. Id. The court explained that neither party knew about  
19 the erroneous description until litigation was commenced regarding  
20 the property, both sides entered and engaged in litigation with an  
21 understanding that the property in question was as alleged by the  
22 plaintiff, and the defendant owner of the property conceded that it  
23 was her intent to sell what she owned, not what was erroneously  
24 described in the earnest money agreement. Id. Based on this, the  
25 court concluded that the record clearly demonstrated a mutual  
26 mistake and allowed the earnest money agreement to be reformed.  
27 Id.

28 I conclude that based on the Deed of Trust itself, and the

1 undisputed facts surrounding the refinance transaction, reformation  
2 is appropriate based on either a scrivener's error or mutual  
3 mistake. The uncontested facts are that (1) the original Deed of  
4 Trust contained the correct street address of the real property in  
5 question; (2) in her Complaint, plaintiff admits that the  
6 transaction was intended to be a refinance of her home mortgage for  
7 her real property located at 1018 NW 92nd Street, Vancouver, Compl.  
8 at ¶¶ 13, 14; (3) plaintiff admits that the correct legal  
9 description for this property is Lot 8 and she did not own Lot 9,  
10 Compl. at ¶¶ 13, 30; (4) when recorded, the Deed of Trust contained  
11 a legal description with a one numeral error in the lot portion of  
12 the description; (5) plaintiff lived at the real property both  
13 before and after this transaction; and (6) plaintiff used the  
14 proceeds of the new mortgage obtained from Ameriquest to pay off an  
15 existing mortgage on Lot 8.

16 While I do not rely on the testimony of Ameriquest's  
17 litigation analyst Claire Cotter who states in her affidavit and  
18 supplemental affidavit that Ameriquest intended to take an interest  
19 in Lot 8 and that it was scrivener's error that led to the lot  
20 being described as Lot 9<sup>1</sup>, the undisputed evidence recited above is  
21 sufficient to establish, even under a clear and convincing standard  
22 required for mutual mistake, that both plaintiff and the moving  
23 defendants intended the refinance transaction, at the time of  
24 execution, to relate to plaintiff's home at 1018 NW 92nd Street in

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26 <sup>1</sup> As I suggested at oral argument, because Cotter has only  
27 reviewed the transaction documents and did not herself actually  
28 participate in the transaction, she lacks personal knowledge to  
attest to Ameriquest's intent and to attest to a conclusion that  
the Lot 9 reference was the product of a scrivener's error.

1 Vancouver with the Lot 8 legal description and that because of a  
2 scrivener's error or mutual mistake, the legal description  
3 contained in the recorded Deed of Trust recited Lot 9 instead of  
4 Lot 8.

5 Even when assuming the truth of plaintiff's testimony that at  
6 the time of signing, the Deed of Trust failed to contain an  
7 abbreviated legal description on page 1 or an Exhibit A with the  
8 full legal description, the law supports a conclusion that  
9 reformation is appropriate based on scrivener's error or mutual  
10 mistake. First, even if the Deed of Trust failed to contain an  
11 abbreviated or full legal description of the property, that does  
12 not negate the undisputed facts recited above, all of which combine  
13 to show that both parties intended the transaction to relate to the  
14 real property with the Lot 8 description.

15 Second, in Key Design, the land sale document at issue in that  
16 case completely omitted a legal description of the property being  
17 sold. 138 Wash. 2d at 877-78, 983 P.2d at 655. While the  
18 agreement was signed and contained an identification of the  
19 property by the business name currently located on the property,  
20 and the street address, the parties left blank the area provided  
21 for insertion of the full and complete legal description. Id.

22 Nonetheless, the court analyzed whether the agreement was  
23 subject to reformation under the doctrine of mutual mistake. Id.  
24 at 888, 983 P.2d at 661. Although the court concluded, based on  
25 the facts of that case, that no mutual mistake was shown, I read  
26 Key Design to stand for the proposition that a land sale document  
27 or deed of trust which omits a legal description, as well as one  
28 that contains an erroneous or otherwise inadequate legal

1 description, may be reformed on the basis of mutual mistake, as  
2 long as the facts supporting a finding of mutual mistake are in the  
3 record. Accordingly, even accepting as true plaintiff's testimony  
4 regarding the Deed of Trust's alleged omission of any reference to  
5 any legal description of the property at the time of signing, it  
6 does not change my conclusion that reformation is appropriate.

7       Additionally, in their supplemental memorandum following oral  
8 argument, defendants provide authority for the proposition that  
9 reformation based on an inadequate, erroneous, or omitted legal  
10 description may occur even after a foreclosure. In Rogers v.  
11 Miller, 13 Wash. 82, 42 P. 525 (1895), the owner of property  
12 borrowed funds from Rogers and gave Rogers a mortgage against his  
13 property to secure repayment. Id. at 83, 42 P. 525. The landowner  
14 later defaulted and Rogers foreclosed on the property. Id. But,  
15 the landowner conveyed the property to another individual named  
16 Miller. Id. Rogers then brought an action to quiet title against  
17 Miller.

18       The recorded legal description of the property did not match  
19 the legal description given in the mortgage. Id. at 85, 42 P. at  
20 526. In the quiet title action, Miller argued, similarly to  
21 plaintiff in the instant action, that a mortgage containing an  
22 inaccurate legal description could not be reformed after  
23 foreclosure of the property. Id. Miller contended that because  
24 the legal description in the mortgage did not match the recorded  
25 legal description made by the landowner in the "notification" filed  
26 in 1855, this mistake in the mortgage "should have been reformed  
27 prior to foreclosure, and that a deed founded upon such false and  
28 erroneous description is wholly insufficient to give color of

1 title." Id.

2 The court rejected this argument. It stated that from the  
3 evidence in the case, it was clear that the original landowner had  
4 entered one piece of land and had but one land claim. Id.  
5 Referring to the parties' intent, the court explained that "[w]hat  
6 [the landowner] undertook to mortgage, and did mortgage, was his  
7 'land claim.'" Id. Thus, the erroneous legal description in the  
8 mortgage did not preclude reformation of the document to conform to  
9 the parties' intentions, even after the foreclosure.

10 While cases from other states are not binding on an  
11 interpretation of Washington law, they are instructive and show  
12 that my conclusion here is not aberrant. See, e.g., Jones v. First  
13 Am. Title Ins. Co., 107 Cal. App. 4th 381, 388-89, 131 Cal. Rptr.  
14 2d 859, 864-65 (2003) (allowing reformation of written instrument  
15 to correct mutual mistake in instrument after foreclosure sale);  
16 Grappo v. Mauch, 110 Nev. 1396, 1398, 887 P.2d 740, 741 (1995)  
17 (third party entitled to reformation of a deed of trust or mortgage  
18 when by mutual mistake the parties to the deed have omitted from  
19 the legal description a tract of land intended to be conveyed, and  
20 the third party subsequently purchases the land under a decree of  
21 foreclosure); Johnston v. Sorels, 21 Ark. App. 87, 91-93, 729 S.W.  
22 2d 21, 23-24 (1987) (purchasers at foreclosure sale allowed to  
23 reform erroneous property descriptions in mortgages two years after  
24 the sale even though purchasers were not parties to the mutual  
25 mistake causing the error).

26 Accordingly, I conclude that the moving defendants should  
27 prevail on their request for reformation based on scrivener's error  
28 or mutual mistake. I find it unnecessary to consider the moving

1 defendants' alternative part-performance argument.

2 IV. Waiver of Error in Notice of Default

3 As noted in the Background section above, the June 30, 2003  
4 notice of default sent to plaintiff by Fidelity identified the  
5 property with the erroneous Lot 9 legal description. Washington  
6 nonjudicial foreclosure statutes require, inter alia, that at  
7 least thirty days before recording, transmitting, or serving a  
8 notice of sale, written notice of default must be transmitted by  
9 the beneficiary or trustee to the borrower and grantor at their  
10 last known addresses by both first class and either registered or  
11 certified mail. RCW 61.24.030(7). The notice must contain, inter  
12 alia, a description of the property which is then subject to the  
13 deed of trust. RCW 61.24.030(7)(a).

14 Defendants argue that under the relevant Washington law,  
15 plaintiff has waived her right to challenge the defective legal  
16 property description in the default notice by failing to object to  
17 it before the foreclosure sale. I agree.

18 As explained by the Washington Court of Appeals, the  
19 Washington Deed of Trust Act has three basic public policy  
20 objectives: "First, the nonjudicial foreclosure process should  
21 remain efficient and inexpensive. . . . Second, the process should  
22 provide an adequate opportunity for interested parties to prevent  
23 wrongful foreclosure. Third, the process should promote the  
24 stability of land titles." Koegel v. Prudential Mut. Sav. Bank, 51  
25 Wash. App. 108, 113, 752 P.2d 385, 388 (1988) (citation omitted).

26 The Act includes specific procedures for stopping a trustee's  
27 sale prior to the sale to allow for the initiation of an action  
28 contesting the default. The Act provides that "[n]othing contained



1 in this chapter shall prejudice the right of the borrower, grantor,  
2 any guarantor, or any person who has an interest in, lien, or claim  
3 of lien against the property or some part thereof, to restrain, on  
4 any proper ground, a trustee's sale." RCW 61.24.130(1). As noted  
5 in a 2003 Washington Supreme Court case, the statutory procedure  
6 outlined in RCW 61.24.030(1) is "the only means by which a grantor  
7 may preclude a sale once foreclosure has begun with receipt of the  
8 notice of sale and foreclosure." Plein v. Lackey, 149 Wash. 2d  
9 214, 226, 67 P.3d 1061, 1066 (2003) (internal quotation omitted).

10 Recipients of a notice of default are informed that the  
11 borrow, grantor, and any guarantor has recourse to the courts under  
12 RCW 61.24.130 to contest the alleged default on any proper ground.  
13 RCW 64.24.030(7)(j). And, recipients of the notice of trustee's  
14 sale are advised that

15 [a]nyone having any objection to the sale on any grounds  
16 whatsoever will be afforded an opportunity to be heard as  
17 to those objections if they bring a lawsuit to restrain  
18 that sale pursuant to RCW 61.24.130. Failure to bring  
19 such a lawsuit may result in a waiver of any proper  
20 grounds for invalidating the Trustee's sale.

21 RCW 61.24.040(1)(f)(IX).

22 As Plein explained, a party waives its right to a post-sale  
23 contest where the party "(1) received notice of the right to enjoin  
24 the sale, (2) had actual or constructive knowledge of a defense to  
25 foreclosure prior to the sale, and (3) failed to bring an action to  
26 obtain a court order enjoining the sale." Plein, 149 Wash. 2d at  
27 227, 67 P.3d at 1067.

28 Based on the waiver provision in the Act, defendants argue  
that plaintiff, who had notice of the right to enjoin the sale,  
knew of the defective legal description, and failed to bring a pre-

1 sale action restraining the sale, cannot now challenge the validity  
2 of the foreclosure. Plein and Koegel teach that defendants are  
3 correct. See Koegel, 51 Wash. App. at 113, 752 P.2d at 388  
4 (challenge to foreclosure based on incorrect description of  
5 property in notice of default waived when not challenged under  
6 Act's provision for pre-sale restraint of sale when there was  
7 knowledge of defective default notice).

8 The Deed of Trust is reformed to contain the correct Lot 8  
9 legal description and as so reformed, it is valid. Any mistake in  
10 property designation in the notice of default is a challenge waived  
11 by plaintiff for failure to bring suit to restrain the sale prior  
12 to the sale. Finally, I reject plaintiff's unclean hands and  
13 estoppel arguments as they find no support in the record.

14 CONCLUSION

15 I grant the motion for summary judgment brought by defendants  
16 Ameritrust, Deutsche Bank, and Fidelity National Title (#52) on  
17 plaintiff's declaratory judgment claim. I deny plaintiff's motion  
18 for summary judgment (#47) on the declaratory judgment claim.

19  
20 IT IS SO ORDERED.

21 Dated this 24th day of August, 2005.

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23  
24 /s/ Dennis James Hubel  
25 \_\_\_\_\_  
Dennis James Hubel  
United States Magistrate Judge  
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